Supreme Court, U. S.
FILED
NOV 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al., Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

POWELL B. GILLENWATER
Browder & Gillenwater, P.C.
3003 North Central Avenue
Suite 2304
Phoenix, Arizona 85012

Attorneys for Transamerica
Title Insurance Company

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation; TITLE INSURANCE COMPANY OF MINNESOTA, A Minnesota corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

INDEX

	Page
Opinion and Judgments Below	1
Question Presented	2
Argument	2
Conclusion	5

CITATIONS

Page

Cocke v. Transamerica Title Ins. Co. of Arizona, 16 Ariz.App. 556, 494 P.2d 756 (1972) 3

Re Gault, 387 US 1, 18 L ed 2d 527, 87 S Ct 1428 (1967) 4

STATUTES AND AUTHORITIES

Arizona Revised Statutes, Section 12-2106 4

Arizona Rules of Civil Procedure, Rule 73(b) 1, 3

OPINION AND JUDGMENTS BELOW

On November 27, 1974, the petitioner sought to appeal to the Arizona Court of Appeals from eight orders and judgments entered by the Superior Court of Arizona in Cause No. C222472. The judgments were entered at various times beginning November 10, 1970, through September 30, 1974. The statutory period for appeal in the State of Arizona is sixty (60) days from the entry of the judgment or order appealed from. Rule 73(b), Arizona Rules of Civil Procedure.

The only judgments that involved respondent Transamerica Title Insurance Company are the judgments entered in favor of Transamerica Title Insurance Company on November 10, 1970, and the judgment upon supersedeas bond and costs entered November 6, 1972. The notice of appeal as to both judgments was filed on November 27, 1974. On February 13, 1975, Transamerica Title Insurance Company of Arizona moved to dismiss the appeal and to impose sanctions for the reason that the appeal was patently untimely and was an attempt to re-appeal a case already previously decided by the Appellate Courts of the State of Arizona. On February 24, 1975, the Court of Appeals entered its Order dismissing the appeal and imposing sanctions. Petitioner did not, during the trial or appellate procedures before the Arizona courts, request a direct ruling by the state courts on any claimed Federal rights.

QUESTION PRESENTED

Does the dismissal of an appeal filed more than two years after the entry of the orders sought to be appealed present a genuine Federal question for review?

ARGUMENT

Petitioner has simply ignored the basis upon which the Arizona Court of Appeals dismissed his attempted appeal and is now attempting to lead this Court to believe that a genuine Federal question does exist for review. The facts are:

Petitioner sought to appeal from eight separate judgments and orders entered in the Superior Court of Maricopa County in Cause No. C 222472. The judgments were entered in said cause from November 10, 1970, to September 30, 1974. However, the only judgments that involved the respondent Transamerica Title Insurance Company are the summary judgments in favor of Transamerica entered November 10, 1970, and the judgment upon supersedeas bond and costs entered November 6, 1972.

The notice of appeal as to Transamerica Title Insurance Company was filed on November 27, 1974, over four years after the judgment of November 10, 1970, and two years after a judgment of November 6, 1972. The statutory time for appeal in the State of Arizona

is, pursuant to Rule 73(b), Arizona Rules of Civil Procedure, 60 days from the entry of the order or judgment sought to be reviewed.

An appeal two years after the entry of one order sought to be appealed and four years after the entry of the other order sought to be appealed is patently untimely. Furthermore, petitioner's attempt at appeal was in fact a second appeal by petitioner from the very judgments sought to be reviewed. The judgment of November 10, 1970, was appealed by Mr. Cocke and affirmed by the Arizona Court of Appeals in Cocke v. Transamerica Title Insurance Co. of Arizona, 16 Ariz. App. 556, 494 P.2d 756.

The Order entered on November 6, 1972, granting judgment upon supersedeas bond and costs was likewise appealed by petitioner and dismissed by the Arizona Court of Appeals as a frivolous appeal on October 2, 1973. In that dismissal, the Court of Appeals stated:

> ". . . It is the opinion of the Court that the appeal from the judgment in favor of Transamerica Title is frivolous."
> Appendix to Petition for a Writ of Certiorari, Volume V, pages 451-452.

It is abundantly apparent that the Court of Appeals dismissed petitioner's attempted appeal as to Transamerica Title for the very obvious reason that the appeal was untimely as to both judgments sought to be reviewed by the appeal. It is likewise abundantly apparent that the Court

of Appeals justifiably imposed sanctions for the reason that the appeal was not only patently untimely but was in fact an attempt to re-appeal from judgments already ruled upon by the Arizona Court of Appeals. Arizona Revised Statutes, Section 12-2106 specifically provides:

> "When the supreme court is of the opinion that an appeal has been taken for delay, and that there was not sufficient grounds for taking an appeal, it may include in its judgment an additional amount, not exceeding ten per cent of the judgment appealed from, if the judgment is for the recovery of money, and not exceeding five hundred dollars in other cases, as damages for a frivolous appeal."

Certainly under the facts of this case where the appellant simply ignores the 60-day jurisdictional requirements for appeal and attempts to appeal one order over four years after its entry and the second order over two years after its entry, in a case where both orders have previously been appealed and decided adversely to appellant, it cannot be said that the Court of Appeals abused its discretion in imposing sanctions.

> "This Court has not held that a State is required by the Federal Constitution 'to provide appellate courts or a right to appellate review at all.' " Re Gault, 387 US 1, 18 L ed 2d 527, 87 S Ct 1428

It follows, that a state may lawfully impose reasonable regulations as to time and content of appeals. In the case at bar, there is no contention that the Arizona appellate limitations as to time and content are unreasonable, arbitrary, discriminatory or in any way unlawful.

In summary, petitioner attempted to appeal long after the statutory 60 days had expired. His appeal was promptly dismissed as untimely. The dismissal simply does not present any Federal questions for review.

Respectfully submitted,

BROWDER & GILLENWATER, P.C.

By Powell B. Gillenwater

Powell B. Gillenwater
3003 North Central Avenue, Suite 2304
Phoenix, Arizona 85012

Attorneys for Transamerica Title
Insurance Company

I hereby certify that on this 5th day of November, 1975, three copies of the Response to Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

Richard L. Thompson
132 South Central Avenue, Suite 7
Phoenix, Arizona 85004
Attorney for Petitioner

Wallace O. Tanner
3800 North Central Avenue
Phoenix, Arizona 85012
Attorney for respondents Title Insurance Company of Minnesota, James Stewart Company and M. Seth Horne and Maurine D. Horne, his wife

Hubert E. Kelly
550 West Washington Street
Phoenix, Arizona 85003
Attorney for respondents Title Insurance Company of Minnesota, James Stewart Company and M. Seth Horne and Maurine D. Horne, his wife

Loretta S. Whitney
603 Luhrs Building
Phoenix, Arizona 85003
Attorney for respondent
Joan H. Cocke

George Sorenson, Jr.
609 Luhrs Building
Phoenix, Arizona 85003
Attorney for Dorothy Cocke
Haimovitz and Elizabeth
Cocke Francis

Powell B. Gillenwater
Browder & Gillenwater, P.C.
3003 North Central Avenue, Suite 2304
Phoenix, Arizona 85012
Attorneys for Transamerica Title
Insurance Company